Nos. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CREACIONES VIVIANA LTDA.,
COMERCIAL ESTRELLA LTDA., and
CONFECCIONES Y TEJIDOS NACIONALES LTDA.,
Petitioners,

vs.

MANUFACTURERS HANOVER TRUST COMPANY,
BANCO ATLANTICO, S.A., and
THE BANK OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI IN PETITIONS NO. 93-1002, 93-1018, 93-1019, 93-1061 AND 93-1073 WHEN PETITIONERS HAVE WITHDRAWN THEIR APPEAL AND NO APPEAL IS PENDING IN THE CIRCUIT COURT.

II. WHETHER THE COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI IN PETITION NO. 93-1020 WHEN THE CIRCUIT COURT HAS NOT GIVEN JUDGMENT, AND WHEN PETITIONERS HAVE NOT DEMONSTRATED THAT THE CASE IS OF SUCH IMPERATIVE PUBLIC IMPORTANCE AS TO JUSTIFY DEVIATION FROM NORMAL APPELLATE PRACTICE.

III. WHETHER PETITIONERS MAY HOLD INTERMEDIARY BANKS INVOLVED IN ELECTRONIC FUNDS TRANSFER TRANSACTIONS LIABLE FOR ALLEGED VIOLATIONS OF THE RIGHT TO FINANCIAL PRIVACY ACT, WHEN THE PETITIONERS ARE NOT "CUSTOMERS" OF THE BANKS WITHIN THE MEANING OF THE ACT.

IV. WHETHER INTERMEDIARY BANKS THAT PROVIDED INFORMATION TO THE GOVERNMENT CONCERNING ELECTRONIC FUNDS TRANSFERS MAY BE HELD LIABLE FOR ALLEGED VIOLATIONS OF THE ELECTRONIC COMMUNICATIONS PRIVACY ACT, WHEN THE BANKS ACTED IN GOOD FAITH COMPLIANCE WITH *IN REM* WARRANTS AND ADMINISTRATIVE SUBPOENAS, WERE PARTIES TO THE ELECTRONIC FUNDS TRANSFER COMMUNICATIONS AND DID NOT "INTERCEPT" THEM.

LIST OF PARTIES

Pursuant to Rule 24.1(b) of the Supreme Court of the United States, the following is a list of parties to all the Petitions:

The Petitioners are Organizacion JD Ltda., Manufacturas JD Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Manufactura del Atlantico Ltda., Manufacturas Internacionales Ltda., and Industrias Marathon Ltda.

Respondents are Banco Atlantico, S.A., The Bank of New York and Manufacturers Hanover Trust Company (succeeded by merger by Chemical Bank) (collectively the "Banks").

Pursuant to Rule 29.1 of the Supreme Court of the United States, The Bank of New York identifies the following parent companies, subsidiaries and affiliates:

> *The Bank of New York Company, Inc.*, ARCS Mortgage Holdings, Inc., ARCS Mortgage, Inc. (California), Armot Corporation, Armot Corporation of Washington, B.N.Y. Holdings (New Jersey) Corporation, The Bank of New York, N.A., NLB Investment Company, Inc., Natcom Investments, Inc., B.N.Y. Holdings (Delaware) Corporation, The Bank of New York (Delaware), The Bank of New York Overseas Finance N.V., Lease Equities (Delaware) Corporation, Lease Equities (Texas) Corporation, BNY Business Center, Inc., BNY Capital Corporation, BNY International Trade, Inc., BNY Trade Insurance, Ltd., BNY One Leasing Corporation, BNY Personal Brokerage, Inc., Capital Trust Company, Eastern Trust Company, Irving Financial Centers, Inc., North American Bancorp., Inc., The Bank of New York Life Insurance Company, Inc., The Bank of New York Trust Company, The Bank of New York Trust Company of California, The Bank of New York Trust Company of Florida, N.A.;

The Bank of New York, BNY Associates Incorporated, BNY Leasing Corporation, Airlease Incorporated, Airlease Foreign Sales Corporation, BNY Capital Funding Corp., BNY New Amsterdam, Inc., Flugel FSC, Ltd., BNY Waterworks, Inc. (99.09%), BNY Wings, Inc., BNY Wings FSC, Inc., ILC Gear, Inc., IRE-1, Inc., IRE-AC, Inc., New GSM Holding Corporation, IRE-Aurora, Inc., IRE-SC, Inc., IRE-BC, Inc., IRE-SB, Inc., IRE-WWP, Inc., Irving Leasing Foreign Sales Corporation, ENMASS, Inc., Flamingo Plaza Realty, Inc., Forty-First Street Holdings, Inc., GH Holdings Inc., Green Island Realty, Inc., Hamlet Holdings, Inc., Horizon at Wayne, Inc., Hulfish Beverage Corp., Hull Junction Holding Corp., IDC (Queens) Corp., Jefferson Plaza Properties Inc., Karpen Properties, Inc., Village Beverage Co., Inc., Landmark Tower, Inc., Linroad Holding Corp., Linroad Realty, Inc., Longtuco Realty Corporation, MacArthur Holdings, Inc., Miami Kendall Properties, Inc., Mid-Plaza Holdings, Inc., MTD Shipping Inc., Newmex Holding, Inc., NO FRILLS, Inc., Odysseus Properties, Inc., One Wall Street Corporation, OVD Holding Inc., Pacshore Holding, Inc., PBP Holdings, Inc., Plymouth Holding Inc., Pohio Holding Inc., PresPark, Inc., Rivohio Holding Inc., Robin Investments, Inc., Station Mall, Inc., Techcen, Inc., Techcen II, Inc., The Fourten South Broadway Corporation, Valley Premises, Inc., Venetia Realty, Inc., VHPL II, Inc., Walnut Hill Center Corporation, Willowtrail Holding, Inc., Wolham Holdings, Inc., Wolpheas Holdings, Inc., Wolstat Holdings Inc., WP Hotel, Inc., Island Waterworks, Inc. (90%), ITC Leasing Corporation, Northern Waterworks, Inc. (99.09%), Waterwheel, L.P. (Partnership) (99%), BNY Generator Lessor, Ltd., BNY Turbine FSC, Ltd., BNY Turbine FSC II, Ltd., BNY Turbine FSC III, Ltd., BNY Turbine FSC IV, Ltd., JCPL Leasing Corp., BNY Financial Corporation, BNY Information Services, Inc., BNY International Financing Corporation, BNY Special Nominees

No. 1 Limited, The Bank of New York (Nominees), Ltda., BNY (Nominees) Limited, The Bank of New York Assessoria E. Consultoria, Ltd., The Bank of New York Capital Markets Limited, The Bank of New York Trust Company (Cayman), Limited, Banco Crediban-co, S.A. (50%), BK Investments, C.A., BNY Australia Limited, BNY Australia Finance Holdings Limited, BNY Worldwide Services Co., Ltd., Compania Dowson, S.A., Irving Trust Company (Nominees) Ltd., Wing Hang Bank, Limited (49%), Banco Weng Hang S.A.R.L., BNY One Capital Corporation, The Bank of New York Commercial Corporation, The Bank of New York Consumer Leasing Corporation, The Bank of New York, S.A., ITCMED, Inc., Sloane Holdings, Inc. (66-2/3%), EPHCO, Inc., LCHCO, Inc., SCHCO, Inc., XYXYXY Corporation, *Real Estate Subsidiaries*, 65th Street Townhouse, Inc., 200 Lombard St., Corp., Allohio Holding Inc., Bogohio Holding Inc., Burbank Holdings Inc., Ca-Tar Properties, Inc., Claymont Holding, Inc., Cronos Properties, Inc., Design Center Bus Company, Inc., Eight Stamford Realty Corporation, Empark, Inc., Empro Properties, Inc.

Banco Atlantico has no parent companies or subsidiaries.

Manufacturers Hanover Trust Company, whose successor by merger is Chemical Bank, identifies the following parent companies and principal subsidiaries:

Chemical Banking Corporation, BaCh Holding Corporation, Brown & Company Securities Corporation, CBC-USA, Inc., CBC Capital Partners, Inc., CBC Holding (Delaware), Inc., Chemical Bank Delaware, CBD Holdings Ltd., SFC Agency, Inc. (OH), Chemical Data Services Corporation, Chemical Insurance Agency, Inc., SFC Agency, Inc. (NY) (d/b/a Chemical Insurance Agency of New York), The CIT Group Holdings, Inc., CBNA Holdings Inc., Chatham Ventures, Inc., Chemadvertising, Inc., Chemical

Bank, Chemical Bank National Association, Chemical Business Credit Corp., Chemical Capital Corporation, Chemical Capital Financing, Ltd., Chemical Commercial Real Estate Advisors, Inc., Chemical Connecticut Corporation, Chemical Educational Services Corporation, The Tuition Plan of New Hampshire, Inc., Tuition Plan Financial Services, Inc., Tuition Plan Consumer Discount Company, Chemical Equity Incorporated, Chemical Venture Capital Corporation, Contcable Corporate Advisers, Inc., Chemical Acceptance Corporation, Chemical Acceptance Corporation I, Chemical Mortgage Acceptance Corporation, Chemical Bank of Canada, Chemical Bank Canada Lease Inc., Chemical Commercial Mortgage Securities Corp., Chemical Community Development, Inc., Chemical International Finance, Ltd., Banco Chemical (Portugal) S.A., Chemical Bank-France, Chemica Bank, A.G., Chemco International, Inc., Chemgraphics Systems, Inc., ChemLease Worldwide, Inc., ChemNetwork Processing Services, Inc., Chem Credit, Inc., Manufacturers Hanover Leasing Corporation, MH Financial Management Systems Inc., Texas Commerce Bancshares, Inc., Texas Commerce Brokerage Company, First City, Texas-Fiduciary Services, Inc., Texas Commerce Equities, Inc., Pyramid Agency, Inc.. Texas Commerce Information Systems, Inc., Texas Commerce Bank Foundation, Inc., Texas Commerce Funding Company, Texcom Venture Capital, Inc., Texas Commerce Shareholders Company, Gulf Building Corporation, Texas Commerce Services Company, Texas Commerce Bancshares Leasing Company, Texas Commerce Leasing Company, Texas Commerce Financial Services, Inc., Texas Commerce Capital Markets, Inc., Texas Commerce Corporate Finance, Texas Commerce Securities, Inc., Texas Commerce Bank (Delaware), Texas Commerce Mortgage Co., Texas Commerce Investment Management Co., Texas Commerce Bank - Corpus Christi, N.A., Texas Commerce Bank - San Angelo, N.A., Texas

Commerce Trust Company of New York, Texas Commerce Bank National Association, Houston, TCB - Leasing Company, Texas Commerce Commercial Leasing Company, Texas Commerce Equipment Leasing Company, Texas Commerce National Leasing Company, Texas Commerce International Leasing Company, Texas Commerce Investment Company, Texas Commerce Mortgage Co., Chemical Financial Services Corporation, Ltd., Chemical Card Services Corporation, Chemical Financial Services Corporation (AZ), Chemical Financial Services Corporation (CA), Chemical Financial Services Corporation (FL), Chemical Financial Services Corporation (GA), Chemical Financial Services Corporation (IL), Chemical Financial Services Corporation (NC), Chemical Financial Services Corporation (PA), Chemical Financial Corporation (TX), Chemical Financial Corporation (WA), Chemical Financial Services Corporation (CO), Chemical Financial Services Corporation (IN), Chemical Financial Services Corporation (KY), Chemical Financial Services Corporation (LA), Chemical Financial Services Corporation (SC), Chemical Financial Services Corporation (TN), Chemical Financial Credit Services Corporation (KY), Sun States Life Insurance Company, Great Lakes Insurance Company, Lorry, Ltd., Chemical Student Services Corporation (CO), Chemical Financial Investment Corporation, Chemical Financial Services Corporation (OH), Chemical Financial Acceptance Corporation (OH), Chemical Financial Services Corporation (OH), Chemical Student Services Corporation (OH), Chemical Futures, Inc. (Inactive), Chemical Futures & Options, Inc., Chemical Futures Management, Inc., Chemical Holding Delaware Inc., CBC Holdings (California) Inc., Van Deventer & Hoch, Chemical Thrift Holdings Inc., Chemical Bank Florida (Savings Bank), Chemical Trust Company of California, The Chemical Investments, Inc., Chemical Mortgage

Securities, Inc., Chemical New Jersey Corporation, Chemical New Jersey Holdings, Inc., Chemical Bank New Jersey National Association, Princeton Bank and Trust Company, National Association, Chemical Investor Services, Inc., Chemical Pennsylvania Corporation, Chemical New York, Inc., Chemical New York - N.V., Chemical Real Holdings, Inc., Chemical Realty Corporation, Side Corp., Chemical Mortgage Corporation, Chemical Securities, Inc., Chemical Securities Holdings, Inc., Chemical Broker Holdings, Inc., Chemical Shareholder Services Group, Inc., Chemical Technologies Corporation, Pronto U.S.A., Inc., BankLink, Inc., Electronic Customer Services, Inc., Pronto, Inc., Chemical Temporaries Incorporated, CVP Management Corp., Manufacturers Hanover Inversiones Y Leasing Limitada, Manufacturers Hanover Leasing International Corp., Manufacturers Hanover Leasing (Nassau) Limited, Manufacturers Hanover Inversiones y Leasing Limitada, Manufacturers Hanover Arrendamento Mercantil S.A., Manufacturers Hanover Wheelcase, Inc. MH World Trade Corporation Mexico, Offshore Equities, Inc., The Andean Fund, Inc., Equifin, Chemical Overseas Holdings, Inc., Select Andean Holdings, Inc., Select Brazilian Holdings, Inc., Chempar Participacoes e Emprendementos Ltd., Select Capricorn Holdings, Inc., Select Cassiopeia Holdings, Inc., Select Life Holdings, Inc., Select Orion Holdings, Inc., Select Pacific Holdings, Inc., Select Rio Grande Holdings, Inc., Select Southern Holdings, Inc., Select Southern Star Holdings, Inc., Sociedad Mexicana Para La Industria Y El Comercio S.A., The Portfolio Group, Inc.

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JURISDICTION

Petitioners purport to base jurisdiction on 28 U.S.C. §§ 1254(1) and 2101(e). As shown below, however, the Court's jurisdiction is precluded by Sup. Ct. R. 11.

STATUTES INVOLVED

THE RIGHT TO FINANCIAL PRIVACY ACT

12 U.S.C. § 3401. **Definitions**

(4) "person" means an individual or a partnership of five or fewer individuals;

(5) "customer" means any person or authorized representative of that person who utilized or is utilizing any service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the person's name;

12 U.S.C. § 3413: **Exceptions**

(a) **Disclosure of financial records not identified with particular customers**

Nothing in this chapter prohibits the disclosure of any financial records or information which is not identified with or identifiable as being derived from the financial records of a particular customer.

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED BY THE ELECTRONIC COMMUNICATIONS PRIVACY ACT OF 1986

18 U.S.C. § 2511: **Interception and disclosure of wire, oral, or electronic communications prohibited**

(2)(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2520: **Recovery of civil damages authorized**

(d) Defense.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense against any civil or criminal action brought under this chapter or any other law.

18 U.S.C. § 2703:

(e) **No cause of action against a provider disclosing information under this chapter.**-- No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, or certification under this chapter.

18 U.S.C. § 2707: **Civil action**

(d) **Defense.**—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization . . .

. . .

is a complete defense to any civil or criminal action brought under this chapter or any other law.

21 U.S.C. § 881: **Forfeitures**

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

> Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims . . . , except that seizure without such process may be made when –
>
> . . .
>
> (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture
>
> . . . .

Rules of the Supreme Court:

> Rule 11: Certiorari to a United States Court of Appeals Before Judgment.
>
> A petition for a writ of certiorari to review a case in a United States court of appeals, before judgment is given in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court. 28 U.S.C. § 2101(e).

COUNTERSTATEMENT OF THE CASE

The Banks respectfully submit this Brief in Opposition to Petitions No. 93-1002, 93-1018, 93-1019, 93-1020, 93-1061 and 93-1073 (collectively, the "Petitions"). The Court granted the Banks' request to file this consolidated opposition in response to the Petitions.

A. *THE UNDERLYING ACTIONS*

The Petitions are an amalgamation of three different legal actions, each of which is in a different procedural posture: 1) *United States v. Daccarett*, 6 F.3d 37 (2d Cir. 1993) ("*All Funds*");[1] 2) *Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992), *appeal withdrawn per stipulation*, No. 92-7360 (2d Cir. 1992) ("*Consolidated Bank Cases*"); and 3) *Organizacion JD Ltda. and Manufacturas JD Ltda. v. United States Department of Justice, Drug Enforcement Administration of the United States of America, Banco Atlantico, S.A. and The Bank of New York, appeal docketed*, No. 93-6019 (2d Cir. Jan. 23, 1993) ("*Organizacion JD*").

All Funds is a civil forfeiture action brought by the United States. All of the petitioners appeared as claimants in that action. Following entry of a judgment of forfeiture against property to which they had asserted claims, petitioners filed an appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit affirmed that judgment. The Banks were not parties to *All Funds*.

In *Consolidated Bank Cases*, certain claimants in *All Funds* brought actions against the Banks. These actions were consolidated and subsequently dismissed by the United States District Court for the Eastern District of New York pursuant to the grant of summary judgment in favor of the Banks. Following the filing of a Notice of Appeal, appellants, by stipulation

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[1] Petitioners refer to the *Daccarett* decision as *U.S. v. All Funds on Deposit at Merrill Lynch, Pierce Fenner & Smith, Inc.*, as the case bore that caption in the District Court. To avoid confusion, the case will be referred to here as "*All Funds*."

which was so ordered by the court, agreed to withdraw and not reinstate their appeal in *Consolidated Bank Cases* until final resolution, including all appeals, of *All Funds*. Subsequently, the Second Circuit denied petitioners' premature motion to reinstate their appeal. Accordingly, no appeal is pending.

In *Organizacion JD*, other claimants in *All Funds* brought an action against the United States Department of Justice, the Drug Enforcement Administration, Banco Atlantico and The Bank of New York. Following dismissal of the action by the District Court, plaintiffs filed an appeal with the United States Court of Appeals for the Second Circuit. The Second Circuit heard oral argument on May 3, 1993 but has not rendered a decision.

B. *THE PETITIONS*

In the Petitions, the petitioners have chosen to mix and match the parties in the three actions:

- In Petition No. 93-1002, petitioners Creaciones Viviana Ltda., Comercial Estrella Ltda., and Confecciones y Tejidos Nacionales Ltda., which were appellants in *All Funds* and plaintiffs in *Consolidated Bank Cases*, name the Banks as respondents, all of which were defendants in *Consolidated Bank Cases*;

- In Petition No. 93-1018, petitioner Abuchaibe Hnos. Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Banco Atlantico (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1019, petitioner Comercial Samora Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Banco Atlantico (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1061, petitioner Industrias Marathon Ltda., which was an appellant in *All Funds* and a plaintiff in *Consolidated Bank Cases*, names as respondents the United States (an appellee in *All Funds*), and Manufacturers Hanover Trust Company (a defendant in *Consolidated Bank Cases*);

- In Petition No. 93-1073, petitioners Manufactura del Atlantico Ltda. and Manufacturas Internacionales Ltda., which were appellants in *All Funds* and plaintiffs in *Consolidated Bank Cases*, name as respondents the United States (an appellee in *All Funds*), and Manufacturers Hanover Trust Company (a defendant in the *Consolidated Bank Cases*); and

- In Petition No. 93-1020, petitioners Organizacion JD Ltda. and Manufacturas JD Ltda., which are appellants in *Organizacion JD*, name as respondents the United States of America, the Drug Enforcement Administration, Banco Atlantico and The Bank of New York, all of which are appellees in *Organizacion JD*.

C. *BACKGROUND*

The Banks are banking institutions that received court orders and instructions from the United States Attorney for the Eastern District of New York to attach the proceeds of certain Electronic Funds Transfers ("EFTs") pursuant to Warrants of Arrest *In Rem* issued in the *All Funds* civil forfeiture action. (See Appendix to *Organizacion JD*, Exhibit B at 12 (hereafter "Pet. App. ____").[2] Petitioners,[3] all of which were claimants in *All Funds*, were the ultimate beneficiaries of certain EFTs attached by the United States.

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[2] For the Court's convenience, respondents have selected the Appendix to *Organizacion JD* as representative of all the appendices submitted by all the petitioners to support all factual references herein.

[3] Comercial Samora Ltda., Abuchaibe Hnos. Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Organizacion JD Ltda., Manufacturas JD Ltda., Industrias Marathon Ltda., Manufactura del Atlantico Ltda., and Manufacturas Internacionales Ltda.

In July and August 1990, the Banks acted as intermediary banks for the EFTs and complied with court orders and instructions from the United States Attorney to attach the EFT proceeds and pay them into Court. None of the petitioners maintained accounts at the Banks. (Pet. App. B at 12). Rather, petitioners were customers of Colombian banks which, in turn, maintained correspondent banking relationships with one or more of the Banks. (Pet. App. B at 12, E at 14-15). The Banks were instructed by EFT communications to credit funds to the Colombian banks' correspondent accounts in New York. The Colombian banks would, in turn, advise their customers of the credits to their accounts.

Before the Banks received the EFT communications, on or about July 18, 1990, the United States District Court for the Eastern District of New York issued a Supplemental Warrant for Arrest of Articles *In Rem*, based upon a Third Amended Complaint in *All Funds*, commanding the Banks to attach "all funds transferred to, through and by" the Banks to Colombian banks for the ultimate benefit of certain named beneficiaries and "all related entities and individuals." (Pet. App. B at 13). The United States Attorney's Office had probable cause to believe that these funds represented laundered drug money being transferred from Europe via New York to Colombia.* (Pet. App. B at 12-13).

The Banks, which were required to comply with lawful court orders, had no information with which to determine whether any particular EFT beneficiary was a "related" entity. (Pet. App. B at 12-13). In order to identify the "related" entities, the United States Attorney instructed the Banks to provide information concerning each EFT directed to accounts maintained with the Banks by the Colombian banks. (Pet. App. B at 12-13, E at 13-14).

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* On May 13, 1991, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. § 881(i) and 18 U.S.C. § 981(g). (Pet. App. B at 16).

Thereafter, in May 1991, United States District Judge Jack B. Weinstein held a three day evidentiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. (Pet. App. B at 17).

The United States Attorney identified which beneficiaries were related entities and ordered the Banks to attach specific EFT funds. The Banks, in a good faith effort to comply with the warrants of arrest, followed the government's orders. (Pet. App. B at 13, E at 13-14).

Over the course of the next several weeks, from July 18, 1990 through August 3, 1990, the United States Attorney's Office for the Eastern District of New York supplemented these instructions and orders with the Fourth, Fifth, Sixth and Seventh Amended Complaints together with accompanying Supplemental Warrants of Arrest *In Rem*. (Pet. App. B at 12-13). All of the claimants were specifically identified as entities whose funds were to be attached. (Pet. App. B at 13).

On July 25, 1990, the Banks were served with a "Summons to Show Cause Why Intangible Property Should Not Be Paid Into Court." (Pet. App. B at 13). This Show Cause Order covered both the funds described in the Warrants of Arrest, and "any and all funds subject to the instant action which are hereinafter deposited, transferred, identified, located, frozen or otherwise discovered or acquired. . . ." The Banks, in compliance with the order, segregated the EFT funds and paid them into Court. (Pet. App. A at 13, E at 15-16).

D. *PROCEDURAL HISTORY*

1. *The All Funds Case*

The government's civil forfeiture action in *All Funds* resulted in a unanimous jury verdict forfeiting approximately $10,000,000 to the United States. (Pet. App. A at 74). As described by the Second Circuit, these forfeitures:

> arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel . . . The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics

> proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts. (Pet. App. B. at 9).

The jury also returned approximately $300,000 to two of the claimants — Organizacion JD Ltda. and Manufacturas JD Ltda. — which the jury determined had met their burden of proving that the funds they claimed were not traceable to illegal activities. (Pet. App. A at 75).

By memorandum decision dated August 5, 1992, the District Court denied the claimants' motion for either a new trial or judgment as a matter of law. (Pet. App. A at 5, 72). The Second Circuit affirmed the District Court decision on April 2, 1993, and subsequently denied a petition for rehearing. (Pet. App. C at 1).

2. *The Consolidated Bank Cases*

While *All Funds* was pending in the Eastern District of New York, eight of the claimants[5] (represented by the same counsel who represented them in *All Funds*) filed ten separate civil actions in the Southern District of New York against the Banks, asserting claims arising from the Banks' compliance with the orders of the Court to attach the EFT proceeds. On motion by the Banks, those cases were consolidated and transferred to the Honorable Jack B. Weinstein in the Eastern District of New York, under the caption *Manufacturas Internacional, Ltda. v. Manufacturers Hanover Trust Co., and Consolidated Cases*, 792 F. Supp. 180 (E.D.N.Y. 1992).

The Banks then moved to dismiss the consolidated actions pursuant to Fed. R. Civ. P. 12(b)(6). Judge Weinstein converted the motion to one for summary judgment and granted the Banks' motion in its entirety and dismissed the complaints.

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[5] Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones Y Tejidos Nacionales Ltda., Manufactura del Atlantico Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda, Manufacturas Internacionales Ltda. and Industrias Marathon Ltda.

The plaintiffs in *Consolidated Bank Cases* filed a Notice of Appeal. However, before perfecting the appeal, the parties entered into a stipulation that was so ordered by the Second Circuit, in which plaintiffs withdrew their appeal with leave to reinstate "within 15 days after *final disposition, including all appeals* in [the *All Funds* Case]." (emphasis added) (a copy of the stipulation is annexed hereto as Respondents Appendix A____ (hereafter "Resp. App. ____")). After receiving the adverse jury decision in *All Funds*, plaintiffs moved to reinstate the appeal in *Consolidated Bank Cases* in direct contravention of the stipulation. The Second Circuit denied the motion on October 14, 1993. Thus, no appeal is pending in the Second Circuit in *Consolidated Bank Cases*.

3. *Organizacion JD*

Meanwhile, on August 5, 1992, after the conclusion of the *All Funds* trial, the two claimants whose funds were not forfeited, Organizacion JD Ltda. and Manufacturas JD Ltda., commenced the *Organizacion JD* action. Banco Atlantico, The Bank of New York and the United States defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) in November 1992. The District Court granted the motions.

Organizacion JD Ltda. and Manufacturas JD Ltda. appealed from the dismissal to the United States Court of Appeals for the Second Circuit. Oral argument was heard on May 3, 1993. A decision has not been rendered as of the date of this submission.

SUMMARY OF THE ARGUMENT

Each of the Petitions suffers from a fatal jurisdictional defect and is not properly before the Court. Only in Petition No. 93-1020 is an appeal pending in the Circuit Court involving any of the Banks, and that appeal has not been decided. Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 fail to satisfy the requirement of Rule 11 of the Rules of the Supreme Court of the United States ("Rule 11") that an appeal must be pending in a United States Court of Appeals in order for the Court to grant a petition for a writ of certiorari. No appeal is pending because petitioners stipulated to withdraw it.

Petition No. 93-1020 is jurisdictionally defective because, although an appeal is pending in that action, no decision and order has been rendered by the Circuit Court, and the Petition fails to raise issues of "such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

Even if the Petitions were free of jurisdictional defects, which they are not, the cases from which the Petitions arise were correctly decided below. Under the express terms of the Right to Financial Privacy Act, petitioners are not customers of the Banks and therefore have no standing to pursue claims against them.

In addition, no statutory "interception" occurred under the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act. The Banks, as the intended recipients of EFT communications properly received the communications in the ordinary course of their business and complied in good faith with court orders and instructions from the United States Attorney in providing information concerning the EFTs. The District Court properly held that the Banks incurred no liability for having done so.

Therefore, the Petitions are fatally defective and do not raise any issues that merit review by the Court.

REASONS FOR DENYING THE WRIT

I.

PETITIONS NO. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 SHOULD BE DENIED BECAUSE THEY SEEK REVIEW OF CASES FOR WHICH THERE IS NO APPEAL PENDING IN THE COURT OF APPEALS, AND THEREFORE FAIL TO SATISFY THE JURISDICTIONAL REQUIREMENTS OF SUPREME COURT RULE 11

Petitioners have asked the Court to consolidate for review the decisions in *All Funds*, an action to which the Banks were not parties, with *Consolidated Bank Cases* and *Organizacion JD*, *see e.g.* Petition No. 93-1073 at 3; Petition No. 93-1020 at 5. Even if the Court decides to review *All Funds*, it should reject petitioners' request because, as shown below, *Consolidated Bank Cases* and *Organizacion JD* are not ripe for review.

Moreover, although the cases share some common issues, the core issues in *Consolidated Bank Cases* and *Organizacion JD*, *i.e.* those concerning civil liability of intermediary banks for compliance with court orders, are unique to those cases. The Second Circuit has not yet been given the opportunity to consider these issues.

Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073 fail to satisfy Rule 11 of the Rules of the Supreme Court, which provides that a party may seek the Court's review only if there is an appeal pending in the Court of Appeals.[6] Petitioners

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[6] There are only three types of cases which are directly appealable from federal district courts to the Supreme Court: (1) when a district court holds a federal statute unconstitutional in a civil action to which the United States is a party, 28 U.S.C. § 1252; (2) when a specific act of Congress requires that a three-judge district court be convened and provides for a direct appeal to the Supreme Court; and (3) when a one-judge district court, having entered a final judgment in a civil action in equity brought by the United States to enforce the antitrust laws, states by order entered on application of the appealing party

(Footnote continued)

seek review of *Consolidated Bank Cases*, which is not pending in the United States Court of Appeals.

In fact, petitioners in Petitions No. 93-1002, 93-1018, 93-1019, 93-1061 and 93-1073, stipulated to withdraw their appeal and not reinstate it until the final disposition of *All Funds*, including all appeals. Despite this stipulation, these petitioners moved before the Second Circuit to have the *Consolidated Bank Cases* appeal reinstated prior to a final disposition in *All Funds*. The Second Court properly denied petitioners' motion to reinstate the *Consolidated Bank Cases* appeal because that appeal is premature. Petitioners should be estopped from disputing the binding nature of their stipulated order. *See Sohappy v. Smith*, 529 F.2d 81 (9th Cir. 1976) (party estopped from attacking decree after having consented to be bound by it); *see also Calvin Klein Ltd. v. Trylon Trucking Corporation*, 892 F.2d 191, 194 (2d Cir. 1989).

Contrary to petitioners' suggestion, they have not been denied an opportunity for Second Circuit review. Instead, the Circuit Court, in the management of its own calendar, has merely sought to enforce the terms of the stipulated order which petitioners executed. Petitioners may yet have their day before the Second Court in due course after the final disposition of *All Funds*.

II.

PETITION NO. 93-1020 SHOULD BE DENIED BECAUSE THE APPEAL HAS NOT BEEN DECIDED BY THE SECOND CIRCUIT, AND PETITIONERS HAVE NOT SHOWN THAT THIS CASE SATISFIES THE STANDARD OF SUPREME COURT RULE 11

In Petition No. 93-1020, petitioners' appeal to the Second Circuit in *Organizacion JD* was argued on May 3, 1993; no

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that "immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice." Expediting Act of 1903, as revised in 1974, 15 U.S.C. § 29(b). *Consolidated Bank Cases* does not fit within any of the categories of cases directly appealable from a district court to the Supreme Court and, in any event, petitioners have not satisfied the requirement of filing a notice of appeal within thirty days. Sup. Ct. R. 18.

decision has been rendered by the Second Circuit. The Supreme Court Rules provide that under such circumstances, a petition for a writ of certiorari will be granted "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate settlement in this Court." Sup. Ct. R. 11.

Petitioners have not articulated, and are unable to show, how this case meets the stringent Rule 11 standard. Their argument is simply that the Second Circuit, by its decision in *All Funds*, has improperly denied their "right to damages" (Petition No. 93-1020 at 49-50). Petitioners do not explain why their alleged right to collect damages in a commercial dispute with the Banks is so imperative to the public that the Court should condone circumvention of the normal appellate procedure.[7] There is no national emergency here. The general public will not be affected if petitioners wait for the Second Circuit to render its decision in *Organizacion JD*. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) ("certiorari [should not be granted] except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . ."). Accordingly, Petition No. 93-1020 should be denied.

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[7] Petitioners recognize the bar to the present Petitions occasioned by Rule 11. They assert that "[d]eviation from normal appellate process" in the *Consolidated Bank Cases* is warranted because the Circuit Court erred in denying their motion to reinstate their appeal. Petitioners contend this is so because *All Funds* and *United States v. Parcel of Land, Building, Appurtenances and Improvements, Known as 92 Buena Vista Avenue, Rumson, New Jersey, et al.*, 113 S. Ct. 1126 (1993) (hereinafter "*Buena Vista*") overruled the District Court's use of the relation back doctrine to bar a claim against the United States. This is a *non sequitur*. The United States is not a party to *Consolidated Bank Cases*. Petitioners concede that the Second Court in *All Funds* did not rely on the District Court's interpretation of the relation back doctrine. (Pet. No. 93-1018 at 50). Moreover, as shown below, *Consolidated Bank Cases* and *Organizacion JD* were correctly decided regardless of whether the relation back doctrine applies. Even if the doctrine were misapplied, the Second Court will have the opportunity to remedy the situation when *Consolidated Bank Cases* is properly before it.

III.

THE DISTRICT COURT CORRECTLY DECIDED THE BANKS DID NOT VIOLATE THE RIGHT TO FINANCIAL PRIVACY ACT

No issue meriting review by this Court was decided erroneously when the District Court held that petitioners lacked standing under the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.* ("RFPA"). Petitioners incorrectly alleged below that the Banks violated the RFPA by (i) intercepting and holding a wire transfer communication; and (ii) providing government officials with information regarding the EFTs.

The RFPA provides a private right of action against a financial institution only to "customers" of that institution, 12 U.S.C. § 3413(a). Under the RFPA, a customer is any individual or partnership of five or fewer individuals who utilized or is utilizing any service of a financial institution in relation to an account maintained in the person's name. 12 U.S.C. § 3401(4), (5). (Pet. App. E at 35, B at 47-58).

None of the petitioners was a customer of the Banks and none maintained accounts with the Banks in their own names. (Pet. App. B at 12, E at 37). In addition, because petitioners are neither individuals nor partnerships[8] of five or fewer individuals, petitioners do not fit within the narrow definition of persons protected by the RFPA. *See Securities & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984) (RFPA "carefully limits the kinds of customers to whom it applies"). The record is explicit that the seized funds were to be credited to the accounts of designated Colombian banks. (Pet. App. B at 55). Even after the funds were seized they were held pursuant to the warrants of arrest and not in accounts maintained by petitioners at the Banks. *See Ridgeley v. Merchants State Bank*, 699 F. Supp. 100,

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[8] Despite petitioners' contention that they are "limited partnerships," their motion pursuant to Rule 44.1 of Federal Rules of Civil Procedure, dated September 15, 1992 filed in *Organizacion JD* shows that under Colombian law they are in fact "limited liability companies."

102 (N.D. Tex. 1988); *Duncan v. Belcher*, 813 F.2d 1335, 1338-39 (4th Cir. 1987).

The District Court correctly held that the RFPA can be enforced only by customers; since petitioners are not customers they have no standing under the RFPA, and cannot rely on it to pursue a claim against the Banks. (Pet. App. E at 35, B at 47). Accordingly, even if the Petitions were free of jurisdictional defects, which they are not, the RFPA does not provide a ground for granting the Petitions.

IV.

THE DISTRICT COURT CORRECTLY DECIDED THAT THE BANKS DID NOT VIOLATE THE ELECTRONIC COMMUNICATIONS PRIVACY ACT BY COMPLYING WITH COURT ORDERS AND INSTRUCTIONS FROM THE UNITED STATES ATTORNEY TO PROVIDE INFORMATION CONCERNING EFT COMMUNICATIONS DIRECTED TO THE BANKS

Petitioners also fail to articulate why the District Court's interpretation of the term "interception" merits review by this Court, especially given that the Banks acted pursuant to lawful Warrants of Arrest. It is indisputable that the Banks did not violate Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520 (the "Omnibus Act"), as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2701-2710 ("ECPA").

A. *As a Matter of Law, the Banks Could Not Have Intercepted Communications Related to the EFTs*

Petitioners claim that the Banks violated the ECPA by illegally intercepting EFT communications and by providing to the government information contained in those communications. This claim is seriously flawed. No interception occurred here.

The statute defines the term "interception" as "the aural or other acquisition of contents of any wire, electronic, or oral

communications through the use of any electronic, mechanical or other device." 18 U.S.C. § 2510(4); *See United States v. Andonian*, 735 F. Supp. 1469, 1472 (C.D. Cal. 1990) (the ECPA applies to "communications which pass from their origin to the intended recipient and are subject to third-party intervention"). The Banks, as intended recipients of the communications, did not "intercept" but properly received the communications in the ordinary course of their business. No statutory interception did occur or could have occurred here. *See* 18 U.S.C. § 2510(4).

B. *The Banks Are Entitled to the Court's Protection*

1. *The Banks Acted Under Color of Law*

Even if the Court were to find that the Banks intercepted a communication, no liability would result because that conduct falls squarely within an express exception to the provisions of the Omnibus Act. Section 2511(2)(c) of the Omnibus Act provides,

> It shall not be unlawful under this chapter for a person *acting under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. (emphasis added).

The Banks took no independent steps with respect to the EFT communications; they simply abided the court orders and directives of the United States Attorney (Pet. App. E at 51). Accordingly, even if the Court found that an interception occurred, the Banks' actions "under color of law" would preclude any liability under the Omnibus Act. *See United States v. Barone*, 913 F.2d 46, 48-49 (2d Cir. 1990).

2. *The Banks Acted in Compliance with Court Orders and are Absolved from any Liability*

Even if the Banks were providers of electronic communication services within the meaning of the ECPA, as petitioners allege, the Banks' compliance with the Warrants of Arrest

absolves them of any liability, pursuant to 18 U.S.C. § 2703(e); 18 U.S.C. § 2520(d)(1); and 18 U.S.C. § 2707(d)(1).

As set forth in 18 U.S.C. § 2703(e):

> No cause of action shall lie in any court against any provider of wire or electronic communications service . . . for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena or certification under this chapter.

Similarly, 18 U.S.C. §§ 2520(d)(1) and 2707(d)(1), the statutes authorizing civil actions for interception and disclosure of electronic communications, both provide a complete defense to any action when there is a good faith reliance on a "court warrant or order . . . or a statutory authorization." *See also* 18 U.S.C. § 2511(2)(a)(ii). (Pet. App. E at 54-55). As the District Court properly decided, the Banks acted in good faith reliance on both warrants and court orders and the statutory authorization granted to the Attorney General under 21 U.S.C. § 881(b)(4), and are entitled the protection of the Court for having done so. *See* Pet. App. E. at 51 ("The Banks should face no liability where they intentionally acted within their perceived legal obligations by following the instructions of the United States Attorney and the court").

CONCLUSION

For the foregoing reasons the Petitions for writ of certiorari should be denied.

Dated: February 18, 1994

Respectfully submitted,

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APPENDIX

MANUFACTURAS INTERNACIONAL	)	
	)	
V	)	Docket #92-7360
	)	
MFRS HANOVER TRUST CO & CONSOLIDATED CASE	)	

The undersigned counsel for the parties hereby stipulate that the above-captioned appeal is hereby withdrawn without costs and without attorneys' fees and without prejudice, subject to reinstatement by written notice to the Clerk of this Court within 15 days after final disposition, including all appeals of USA v. All Funds on Deposit at Merrill Lynch etc. CV90-2510 in Eastern Dist of NY; and if not thus reinstated, shall be deemed withdrawn with prejudice.

/s/ Maureen K. Stein
Attorney for Appellee
Manufacturers Hanover
Trust Company

/s/ Isidoro Rodríguez
Attorney for Appellant

/s/ Michael Povman
Attorney for Appellee
Michael D. Povman
Attorney for The Bank of
New York

/s/ Mark S. Sullivan
Attorney for Appellee
Townley & Updike
by: Mark S. Sullivan
Attorneys for Banco
Atlantico

Counsel: Please print name and firm under signature.

SO ORDERED:

FOR THE COURT,

/s/ Elaine Goldsmith
Elaine B. Goldsmith
Clerk

May 1, 1992
(Date)

ATACHMENT I
[sic]